United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2380

ORIGINAL

1/3/75

To be argued by
LAWRENCE S. GOLDMAN

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

ELDON TURCOTTE and FORREST GERRY, JR.,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York.

BRIEF FOR DEFENDANT-APPELLANT, FORREST GERRY, JR.

GOLDMAN & HAFETZ
Attorneys for Defendant-Appellant Forrest Gerry, Jr.
60 East 42nd Street
New York, New York 10017
(212) 682-8337

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TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF CASES CITED (cont'd)

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UNITED STATES OF AMERICA,

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Docket No. 74-2380

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BRIEF ON BEHALF OF DEFENDANT-APPELLANT FORREST GERRY, JR.

PRELIMINARY STATEMENT

This is an appeal by defendant-appellant Forrest Gerry, Jr. from a judgment of conviction entered in the United States District Court for the Eastern District of New York after trial (Hon. Thomas C. Platt and a jury) on October 11, 1974.

Defendant Gerry was convicted of one count of Obstruction of Justice in corruptly endeavoring to influence a witness before a Grand Jury of the Eastern District of New York to give false testimony (18 U.S.C. 1503) and one count of Conspiracy to Obstruct Justice by endeavoring

with another to induce that witness to give false testimony and to procure Elden Turcotte, a co-defendant, to commit perjury (18 U.S.C. 1503, 1622).

Turcotte was convicted of both counts enumerated above as well as of one count of perjury.

Gerry was sentenced to a term of imprisonment of four years on both counts for which he was convicted, to run concurrently with each other and with a sentence imposed previously on Ind. 73 Cr. 1068 in the Eastern District of New York. In addition, he was fined $5,000 on each count. Execution of sentence has been stayed pending appeal.

STATEMENT OF FACTS

The Government's Case

Ralph Wilkinson, foreman of the Special May, 1972 Grand Jury for the Eastern District of New York, testified that in April or May of 1973 that Grand Jury began an investigation to determine whether there was sports bribery in harness racing with particular respect to the fixing of races. The jury was concerned with who cashed winning race tickets, who owned horses involved in harness racing, whether defendant Gerry owned or cashed winning tickets, whether he owned horses and what his relationship was with the drivers and trainers (63-64, 65-67).* On September 14, 1973 Elden Turcotte testified before the Grand Jury under oath relating to the Grand Jury's attempt to determine what trainers owned horses and what their relationship was to Gerry (68-69, 71).

On May 21, 1973 and September 10, 1973, Wilkinson testified, David Kraft was also a witness before the grand jury (97, 103-104). On May 21, 1973 Kraft was directed to reappear before the Grand Jury on May 29, 1973. He may have returned to the courthouse but he did not testify before the Grand Jury on that date (110-112).

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*References, unless otherwise noted, are to the trial transcript. References marked "A" are to the defendant-appellant Gerry's appendix.

Elizabeth Ng, the grand jury stenographer on September 14, 1973, the day Turcotte testified, stated that she took down and transcribed his testimony, a copy of which was admitted in evidence (GX1)* (120-122).

David Kraft, the owner of a trucking company, oil company and motel, testified that he had a business arrangement with defendant Gerry to win money by betting on Superfecta races (144-147). In this arrangement, Gerry fixed the outcome of races and called Kraft at his office and told him how to bet. In the scheme, Kraft won a lot of money (149).

Kraft's sons owned a farm, called Kraft Hill Farm, that was licensed to race horses at harness racing tracks. In March of 1974 Gerry asked Kraft if he could register some horses in the farm name so that he could pass them through for resale. Gerry explained that he had to do this since he had no license and only a licensed owner could register a horse for resale in a race (150-151, 153)

In early April Kraft received a purse check from Roosevelt Raceway indicating that a horse had run there in the name of Kraft Hill Farm (153). Fearing possible loss of license or suspension, Kraft shortly thereafter called Gerry and told him to get the horse out of the Kraft Hill Farm name (154, 157-158). Kraft received a total of ten to twelve purse checks from the two horses he said Gerry had registered in the farm name. He kept all the proceeds of these races (158-159).

* "GX" refers to a Government Exhibit.

On May 21, 1973 Kraft testified before the Grand Jury (159-160).

On or about July 21, 1973, Gerry, who ordinarily visited Kraft at his home in New Jersey on weekends, came to his home (159, 160). Gerry told Kraft that he knew that Kraft had retained a lawyer who would advise him to seek immunity and then testify honestly. If so, said Gerry, Kraft would cause a lot of trouble for himself and his sons (160). Gerry also said that he would transfer the registration papers for the horses into Turcotte's name (165-166).

On July 25, 1973 Kraft was arrested for perjury committed during his Grand Jury appearance on May 21, 1973. That day he agreed to cooperate with the government (166).

On August 4, 1973 Gerry again visited Kraft at his home. With Kraft's consent the conversation was secretly recorded by the F.B.I. Gerry suggested that Kraft get rid of his lawyer and hire a lawyer named Bobick,* who would get him out of trouble and tell him what to say to any agency (169).

Gerry and Kraft agreed that they both believed that Kraft had not perjured himself in the Grand Jury. Gerry said that they should both say that Gerry gave Kraft information on races he had handicapped and Kraft had bet as Gerry recommended at O.T.B., and that Kraft should testify that way before the

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*Edward Bobick was also defendant Gerry's trial counsel.

Grand Jury (169-170). When Kraft expressed concern about drivers who were given tickets, Gerry said that Kraft should not worry since Gerry had always paid the drivers in cash (171-172, 199-201).

Gerry had with him the registration forms for the two horses, Milty Hanover and Adios Misty. At Gerry's request, Kraft's son Terry, a principal of Kraft Hill Farm, signed as seller a blank form (173-174). Kraft also asked how the horses were doing. When Gerry told him that one had run a 2:04, Kraft told Gerry to keep him out of a low claiming race since a horse that good would be bought (174).

On August 19, 1973 Gerry and Turcotte visited Kraft at his home. Their conversation was also recorded by the F.B.I. Gerry introduced Turcotte and said that they had to discuss a story (179-181). Turcotte, in Gerry's presence, told Kraft that he would say they met at Freehold Raceway or that a friend of Kraft had recommended him. Turcotte said that Kraft had wanted to sell the horses for $15,000 and since Turcotte did not have the money to purchase them, he found a prospective buyer. However, before the sale could take place, one horse, Milty Hanover, was picked up in a claiming race for $10,000. The other was then sold to a friend of Turcotte for $5,000. Turcotte then asked where he should say he gave Kraft the cash (181-184).

Kraft said he had no record on his books of ever

purchasing the horses. Turcotte said that a $5,000 loss was a good thing to show I.R.S. (182-183). Turcotte brought Kraft a $10,000 check for the horse that had been claimed and he and Gerry asked Kraft to endorse it. Kraft told them that a corporate check could not be endorsed and had to be deposited and they left the check with him (184-185). Turcotte also said he split the horses' winnings on a 55-45% basis, with 55% of its winnings to him as trainer-driver and 45% to Gerry as the owner (196-197).

Gerry then asked Turcotte to leave the room. He told Kraft that if he said that Kraft Hill Farm had bought the horses for $21,000, there would be no problem. Kraft again protested that he had no entries in his books concerning the purchase of the horses. Gerry replied that he, Gerry, always bought horses for cash (185-187).

On August 30, 1973 Gerry again visited Kraft at his home (187-188). Gerry was upset about never receiving the $10,000 from Kraft. Kraft said that the Government had seized his books and that he could not give Gerry the money at that time (189). Gerry said that if Kraft had kept his mouth shut and admitted he owned the horses, there would have been no investigation. Kraft said he had told the Federal Government everything. Gerry replied "Good, tell them the truth, don't forget and tell them the truth". (190).

On September 7, 1973 Turcotte came to see Kraft and asked for money. Kraft told Turcotte that he could not give anybody money at that time and advised Turcotte to see Gerry (191-193).

Kraft admitted that he was convicted in 1971 for receiving stolen property. He was fined $1,600 and placed on probation. He also admitted having pleaded guilty to sports bribery (194).

On cross-examination, Kraft said he believed he did not lie in the Grand Jury on May 21, 1973 (212, 233-235). He had not yet been sentenced on the sports bribery charge to which he had pleaded guilty three and one-half months earlier (236, 324). He said the only consideration he received for his testimony was the Government's promise to bring his cooperation to the attention of the sentencing judge and to request leniency for him (319).

However, Kraft later admitted that the Government attorneys promised that after the trial they would call the New Jersey racing authorities to ask them to lift the revocation or suspension of his sons' license (331).

Kraft admitted that he had received eleven or twelve purse checks totaling $11,613, all of which he deposited in the Kraft Hill Farm account (248, 260).

Kraft also admitted that the defendants may not have used the term "grand jury" in their conversations but that they were talking about "investigative agencies" (342). He also admitted that prior to the August meetings, Gerry was aware that

he had been arrested for perjury (345).

Kraft admitted that one can own horses without a license from the United States Trotting Association but could not race them. And one without a license could act as a broker, although that, he said, would be a "rarity" (376-379). Since Gerry had no license at all, he could not be penalized by loss or suspension of license (422-423).

Kraft admitted lying earlier in the trial when he told the jury he owned a trucking company (390-391). He admitted that on August 19, 1973 he refused to give to Gerry the claiming price for Milty Hanover on the "advice of the F.B.I.", although he had testified in a prior trial that nobody advised him not to return the money (414-416, 436).

Kraft also admitted that he felt that Gerry had taken advantage of him in their betting arrangement and, therefore, had caused him to lose money (547).

Kraft denied that he had been told by the governemnt that there would be "no trouble" about the sentence that would be imposed by Judge Judd (590). He purported not to recall a conversation from a tape recording made of a corversation involving him and one Walsh, an F.B.I. agent (DX "R")* In that conversation, introduced only as it reflected on Kraft's credibility,

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* "DX" refers to a defense exhibit.

Kraft says:

"I pleaded guilty and this fucking guy walks out of here. They will never walk out of here ..."(593)

"I got no more problems either way ..." (594)

"I pleaded for nothing. I am a winner ...." (593)

Daniel J. Goldberg, an investigator for the New York State Racing & Wagering Board, testified that Forrest Gerry was not licensed as a trainer or driver in 1973 and had not been licensed since 1967 or 1968 (653, 656-657). An owner must be licensed to run horses in New York tracks, Goldberg testified, but does not need a license merely to own horses (664). An owner could pull his horse out of a race it was scheduled to run in by notifying the Board or the track (668-669).

Goldberg said that if Forrest Gerry had improperly put a horse he owned under the name of a licensee, Gerry, who was not a licensee, could not be punished by the Board although the horse could be prevented from racing (672). However, if a licensee held a horse under his name that belonged to another, he could lose a license to race all his horses - not just the one involved (676-677). Goldberg also testified that one did not need a license to act as a broker between a buyer and seller (673).

Robert Luehrman, registrar of the United States Trotting Association, identified the files on two horses, Adios Misty (GX2) and Milty Hanover (GX3) (692,695-696). The file on

Adios Misty showed that on April 5, 1973 the horse was sold to Kraft Hill Farm, and on August 14, 1973 was sold to Nicholas Lombard by Kraft Hill, with Terry Kraft signing as seller (697-698). The file on Milty Hanover revealed that on April 5, 1973 the horse was bought by Kraft Hill, and on August 14, 1973 was "claimed" by Louis Martinez in a claiming race, with Terry Kraft signing as seller (700-701).

Luehrman testified that if an owner called the U.S.T.A. and complained that a horse being raced in his name actually belonged to another, the Association would recall the registration certificate (722). He also said that the name of a broker would not appear in the file, and that there was nothing improper about unlicensed persons acting as a broker (727-728).

Lawrence N. Mallar, the racing secretary at Roosevelt Raceway, identified the eligibility papers of Adios Misty (GX10) and Milty Hanover (GX11) (732-734). The papers of Adios Misty included a "claiming slip" with Eldon Turcotte listed as agent for the owner (742-743). In Mallar's opinion, it was "standard procedure" for a trainer to sign as agent of the owner to enter a horse in a claiming race (756). Mallar also testified that he knew Gerry to be a "horse broker" (754).

James Thomas Murphy, a plumber, testified that he had bought Superfecta tickets for Gerry. In August of 1973 Gerry met him and asked if the F.B.I. had spoken to him. If they

did, cautioned Gerry, Murphy should say he never bought tickets for Gerry (800-802). Murphy also testified that at one time, perhaps in late 1972, Gerry told him he used to own Milty Hanover (803, 821-822).

As part of its case, the Government also introduced and played to the jury tape recordings of the August 4, 1973 (GX4), August 9, 1973 (GX5) and August 30, 1973 (GX6) conversations between Kraft and the defendants.*

The Defense

Defendant Turcotte's Case

Joseph M. Fanning, a special agent for the F.B.I., signed an affidavit in support of an arrest warrant for Kraft for perjury (854, 858). He made a report of his conversation with Kraft that day (858, 862).

Sean Hilly, a special agent for the F.B.I., testified that he was present in Kraft's basement during the conversations between Gerry and Turcotte (867). Prior to the August 4, 1973 conversation, he spent approximately twenty hours with Kraft and asked him to ask the defendants certain questions (869).

Defendant Gerry's Case

Joseph Michael Pullman, an unemployed trailer driver who worked for David Kraft's trucking company from September 1973

* Transcripts of these conversations are found in defendant-appellant Gerry's appendix as follows: GX4, A 65; GX5, A112; GX6, A169.

to April 1974, testified about a conversation he had with Kraft in the beginning of 1973 concerning the horses Adios Misty and Milky Hanover. Kraft had told him that he had received money for a horse that had died and had used the money to buy the two horses. Kraft asked Pullman if he wanted to be a "silent partner" in the ownership of the horses (880-881, 390-891).

On another occasion Kraft told Pullman that he had a lot of trouble getting his horses to be allowed to race in New Jersey, and that the Government assisted him in getting them to be able to run in Pennsylvania (895-896). Concerning his plea of guilty to the sports bribery charge, Kraft had told Pullman a few months ago that he "is going to walk" and that he had received a promise that he was not going to jail (897-900).

In April, 1974 Pullman was present at a conversation between Kraft and an F.B.I. agent named Walsh. In the conversation Kraft testified he did not have a "care in the world", he was not going to jail, and all his ties were severed. As to Gerry, however, Kraft said, "That little ------. He's got everything to worry about." (904).

Arthur Robert Walsh, an F.B.I. agent, testified that he had never heard anyone tell Kraft that he would not go to jail (924-930). Walsh did admit, however, that he had given Pullman, then a Government witness, his "personal word" that he would not "do time" (932).

Forrest Gerry, Jr., the defendant, testified in his own behalf. In 1973, Gerry testified, he was involved with Kraft in the sale and purchase of some horses. Kraft had bought a horse named Chieftain from a New Zealand trainer for $25,000. When the horse died, Kraft asked Gerry to find one or two horses for Kraft to buy with the insurance proceeds. Gerry later told Kraft that Milty Hanover and Adios Misty were available for $21,000 and were a good buy. Kraft said he would buy them when the insurance check came in. Gerry told him that the horses would probably not be available then, and agreed to lay out $21,000 for their purchase with the understanding that he would be repaid by Kraft when the insurance proceeds came in (938-943). On Kraft's behalf Gerry engaged Turcotte to train and raise the two horses (943-944).

In July of 1973 Kraft was arrested for perjury. After an article about the arrest appeared in the New Jersey papers, the New Jersey Racing Commission began an investigation of Kraft. Kraft then asked Gerry to bring Turcotte to his house to get a story straight to protect his sons' licenses before the commission. In July and August Gerry did not think that Kraft would testify before the Grand Jury since he believed that once a person is arrested, he cannot be called to testify before the Grand Jury (945-946, 949). He never told Kraft to lie before the Grand Jury. In fact, as the tapes show, when Kraft said that he was

going to go to the Federal Government, Gerry told him to go ahead and tell the truth (953).

On cross-examination, Gerry said that he had been a horse broker "all his life" and had never entered a written agreement. He did not pay for the two horses by check since sellers would not accept a check because if a horse was injured just after the sale, the buyer might stop the check (959). He said he never asked Kraft for the purses the horses had won, but only for the $21,000 he laid out (959).

Gerry admitted that Connie Rogers, a girl friend, had been called before the Grand Jury and then arrested for cashing tickets under a false name. She was brought to trial and represented by Mr. Bobick (Gerry's trial counsel). She had been represented by Mr. Greenspan, who had been Kraft's lawyer, and Gerry advised her to go to Bobick (985-987). He also admitted being brought before a grand jury himself in 1966 (988a-991).

POINT I

THE GOVERNMENT FAILED TO PROVE DEFENDANT GERRY'S GUILT BEYOND A REASONABLE DOUBT.

In order to sustain his conviction for obstructing justice, it must be proved beyond a reasonable doubt that the defendant Gerry knew that Kraft and Turcotte were to be called as witnesses before the Grand Jury. United States v. Bufalino, 285 F.2d 408, 416 (2d Cir. 1960); United States v. Griffin, 463 F.2d 177 (10th Cir. 1972), cert. den. 409 U.S. 988 (1972); United States v. Ryan, 455 F.2d 728, 733-734 (9th Cir. 1972); Walker v. United States, 93 F.2d 792-795 (8th Cir. 1938); United States v. Solow, 138 F. Supp. 812, 814 (S.D.N.Y. 1956).

The gist of the Government's case against Gerry is that Gerry tried to impede the Grand Jury investigation on August 4, 1973 and August 19, 1973 by inducing Kraft to give false testimony concerning their joint betting scheme and concerning the ownership of the horses Adios Misty and Milty Hanover, and by, on August 19, 1973, procuring Turcotte to perjure himself. While viewing the evidence in the light most favorable to the Government does show that Gerry attempted to fabricate a story with Kraft and Turcotte, the credible evidence does not show that the false sotry was intended to be given to the Grand Jury.* Indeed, the

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* Although Kraft at one point testified that the defendants mentioned that the false story was intended for the Grand Jury (181) he admitted on cross-examination that the defendants were talking about "investigative agencies" (342).

only undisputed evidence in the case - the tapes of the August 4, August 19 and August 30 conversations, which all parties concede are an accurate reproduction of the discussions - clearly show that neither of the defendants said that the story was intended for the Grand Jury (A65-A197). In fact, the tapes indicate that Gerry at the time of the August 4, 1973 and August 19, 1973 meetings did not believe that Kraft would testify before the Grand Jury again.

First, at the time of the alleged obstruction, Gerry was aware that Kraft had been arrested for perjury and that his subsequent request for immunity had been denied. Gerry believed, as he testified, that a person who had been arrested could not be recalled before a Grand Jury. And, despite the prosecutor's attempt on summation to belittle Gerry's statement in that regard (1149), it is clear that except in an unusual case (or one in which a defendant decides to cooperate with the government) a person who has been arrested for perjury will not be recalled before the Grand Jury investigating the same matter.

Second, throughout the tapes there is no hint until the August 30, 1973 meeting, that Kraft was going to re-appear before the Grand Jury. On August 19, 1973 Kraft specifically denied the rumor that Gerry had heard that Kraft was going to cooperate with the government (A135). And, when on August 30, 1973 Kraft revealed that he might cooperate with the Government,

Gerry told him "Just tell the truth ... Tell them exactly the truth on everything" (A176-177, A180-181).

The obstruction, therefore, if any, occurred prior to the August 30, 1973 meeting - when for the first time, viewing the evidence in the light most favorable to the government, Gerry learned that Kraft was likely to be a witness before the Grand Jury.

Third, Kraft's conduct at the August 4, 1973 meeting was inconsistent with that of a man who expects to be called back before the Grand Jury. At that meeting Kraft discussed the merits of his pending perjury case (A68-75, A78-81). He worried that Connie Rogers might implicate him (A74-77, A88). His conduct was that of a worried defendant or prospective defendant, not that of a prospective Grand Jury witness.

While Turcotte at the August 19 meeting did allude to the possibility of a lineup involving the FBI (A131), this is no evidence that either he or Kraft intended to testify before the Grand Jury, or more importantly, that Gerry believed they would. Moreover, even if the defendants did intend to impede the FBI investigation, such conduct is not a violation of 18 U.S.C. 1503. United States v. Bufalino, supra; Haili v. United States, 260 F.2d 744 (9th Cir. 1958). And, in this regard, the prosecutor's effort in summation to confuse this issue was disingenuous (1143-1144, 1146).

Fourth, there is no evidence that either Turcotte or Kraft were subpoenaed or in any way notified to appear before the Grand Jury, or that Gerry knew that they were requested to testify.

In sum, the government failed to prove an essential element of the crime - that at the time of the alleged obstruction, defendant Gerry knew or should have known that Kraft or Turcotte were to testify before the Grand Jury. The indictment against Gerry must, therefore, be dismissed.

POINT II

THE COURT COMMITTED REVERSIBLE ERROR IN CURTAILING THE CROSS-EXAMINATION OF DAVID KRAFT.

The Government's case rested largely on Kraft's credibility. While both the defendants and the Government apparently conceded that the tapes were accurate reproductions of the conversations involving Kraft and the defendants, Kraft's testimony was crucial on the critical issue of whether the defendants' alleged attempts to fabricate a story were with a view to the Grand Jury inquiry or the New Jersey Harness Racing Commission investigation.

In their cross-examination of Kraft defense counsel were severely curtailed by the trial court in their attempt to impeach this critical witness. This curtailment was an abuse of discretion and requires reversal of Gerry's conviction. Alford v. United States, 282 U.S. 687 (1931); United States v. Wolfson, 437 F. 2d 862 (2d Cir. 1970); United States v. Padgent, 432 F.2d 701 (2d Cir. 1970).

A. Kraft's Efforts to Gain Immunity

First, the defense was improperly prohibited from questioning Kraft in the presence of the jury* as to whether he had been denied his request for immunity, and whether he had

*An extensive offer of proof was made outside the presence of the jury.

told Gerry that he was not granted immunity (436-463, A20-47). This line of questioning was clearly germane to the central issue of whether Gerry knew or believed at the time of the taped conversations that Kraft was going to reappear before the Grand Jury, since, as Gerry testified, he believed that Kraft would not testify unless granted immunity (946). See Point I, supra. However, the trial court, apparently believing that it did not matter whether Gerry knew or believed that Kraft would be a witness, as long as Kraft did in fact become a witness, erroneously prohibited this crucial testimony (463, A47). Curtailment of cross-examination on this crucial point was serious error and mandates a reversal.

B. Kraft's 1960 Conviction

Second, the trial court wrongly precluded the defense from impeaching the witness by bringing out a 1960 conviction in New Jersey for atrocious assault and battery, a felony. The court disallowed examination on this conviction on the ground that it was more than ten years old, apparently relying in error on what the prosecution said was the rule enunciated in Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965) (236-237, A9-10). In Luck the Court left to the trial court's discretion whether to admit into evidence proof of a prior conviction. The Court's principal fear was that proof of a defendant's unsavory background might divert the jury from its

quest for the truth. While stating that the age of a conviction was a factor to be considered, the Court set no time limit. Moreover, in United States v. Puco, 453 F.2d 539, 543 (2d Cir. 1971), cert. den. 414 U.S. 844 (1973) this Court specifically rejected rigid age limitations on the use of prior convictions for impeachment purposes.

This Court has recognized the difference between allowing impeachment by prior conviction of a defendant-witness and a non-party witness. United States v. Owens, 263 F.2d 720, 721 (2d Cir. 1959); United States v. Provo, 215 F.2d 531 (2d Cir. 1954). With respect to a non-party witness there is not the great danger of undue prejudice as there is with a defendant-witness. Indeed, knowledge of Kraft's conviction and its effect on the credibility of this crucial witness would aid the jury in its search for truth. Accordingly, the trial court's refusal to allow the defense to bring this conviction to the attention of the jury was error.

C. Kraft's Pending Case in New Jersey

Third, the trial court erroneously prevented the defense from questioning Kraft aobut a pending receiving stolen property case in a New Jersey state court. Defense counsel sought to question Kraft about this case in order to show that his expectation of Government assistance in the disposition

of that case motivated his false testimony. In support of his offer of proof on this issue, defense counsel stated his belief, based on the record of a prior trial in which Kraft testified, that the witness was to receive consideration in the New Jersey matter for his testimony in this trial. Nonetheless, the trial court ruled that since the case was not in the Eastern District of New York, the defense could not question Kraft about it (240-243, A12-15).

While the court did say that defense counsel could ask the witness directly whether any promises had been made to him for his testimony, that question is no substitute for a proper cross-examination of a critical Government witness. Moreover, the court added, incorrectly, that the defendants "may be bound by his answers." (243, A15) See United States v. Haggett, 438 F.2d 396, 399 (2d Cir. 1971), cert. den. 402 U.S. 946 (1971).

This Court has stated, "When a witness in a criminal case is being questioned as to his possible motives for testifying wide latitude should be allowed in cross-examination." United States v. Masino, 275 F.2d 129, 132 (2d Cir. 1960). And, this court has not limited this questioning to cases pending in the district in which the trial was held. United States v. Wolfson, supra, United States v. Padgent, supra. Thus, the trial court's limitation on examination of whether the witness was

to receive consideration in the New Jersey court for his testimony at this trial was serious error.

D. Kraft's Attempt to be Sentenced Prior to Trial.

Lastly, the trial court improperly prohibited defense counsel from asking Kraft, who had pleaded guilty to sports bribery three and one-half months before this trial, whether he had asked to be sentenced on that charge prior to this trial (324-325, 357-358, A16-19). When defense counsel asked that question, Kraft replied that he did not know how to answer it. Defense counsel, thereupon, in an offer of proof, represented to the court that Kraft had made such a request. The court ruled that before the defense counsel could question Kraft further in this area, it had to produce a stenographic transcript of Kraft's request. Otherwise, said the court, the defense was "bound" by the response (358, A19).

The purpose of the question was to show that Kraft wanted to be able to testify without the pressure of a pending sentence hanging over his head. It was clearly a proper means for defense counsel to probe-to show that Kraft felt such pressure. The court's demand that defense counsel engaged in trial produce a court transcript to justify questioning, especially when there was no allegation that defense counsel's representation was untrue, was clearly unfair. And, the court's ruling that the defense was

bound by the witness's equivocal and evasive response was tantamount to a total prohibition of questioning in this area. That ruling was another improper curtailment of cross-examination.

In sum, the accumulated errors in denying the defense an opportunity to cross-examine Kraft on areas clearly relevant to defendant Gerry's state of mind, to Kraft's credibility, and to Kraft's motivation to testify falsely denied defendant Gerry a fair trial. These errors require a reversal and a new trial.

POINT III

THE COURT COMMITTED REVERSIBLE ERROR IN ALLOWING CROSS-EXAMINATION OF DEFENDANT GERRY ON IRRELEVANT AND HIGHLY PREJUDICIAL MATTER.

In sharp contrast to its severe curtailment of the defendants' attempts to impeach Kraft's credibility, the Court allowed the Government to cross-examine Gerry on a host of inadmissible, irrelevant and highly prejudicial matters. In an obstruction of justice trial, of course, some background of a defendant's criminal involvement may be presented to the jury to show motive. United States v. Knohl, 379 F.2d 427, 438-439 (2d Cir. 1967), cert. den. 389 U.S. 973 (1967). However, the trial court must carefully control this evidence to prevent the jury from convicting the defendant solely because of those uncharged crimes. In this case, however, the accumulation of errors in this area made it impossible for the jury to limit its consideration to the charges for which Gerry was tried, and, therefore, constituted reversible error. See United States v. Lewis, 447 F.2d 134 (2d Cir. 1971); United States v. Tomaiolo, 249 F.2d 683, 690 (2d Cir. 1957).

A. The Arrest and Conviction of Connie Rogers.

First, over a constant stream of defense objections, Gerry was forced to admit that his girl friend, Connie Rogers, had been arrested for cashing Superfecta tickets under a false

name (985, A48). He admitted that her attorney was Bobick, his own trial counsel, whom he had recommended instead of Greenspan, who was her first attorney (986-987, A49-50)*

The Court allowed these questions on the ground that it affected Gerry's credibility (985, A48). When defense counsel tried to end this line of questioning, the Court not only overruled the objection but invited further questioning. The prosecutor's next question was "Now, do you know whether or not Connie Rogers had been convicted?" An objection by defense counsel was sustained (987-988, A50-51).

The Government's questioning in this area was a blatant attempt to tar Gerry with "built by association." Although arguable, some questioning about Connie Rogers was permissible to show Gerry's awareness of the Grand Jury proceeding, in no way was her arrest and conviction relevant. The sustaining of the objection as to whether Ms. Rogers was convicted did not cure the error. "... After the saber is thrust, the withdrawal of the saber still leaves the wound." United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968).

By its questioning the Government was also allowed to convey the impression, without any basis in fact, that Gerry sacrificed his girl friend by recommending his own lawyer to her. Moreover, this matter reflected unfavorably on Bobick, Gerry's

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* It may be argued by the Government that Gerry similarly recommended that Kraft leave Greenspan and retain Bobick. However, this conduct is in no way relevant and cannot be admitted as a prior similar act.

lawyer, by insinuating that he was in some way involved in a sinister conspiracy with Gerry, and further prevented Gerry from receiving a fair trial.

B. The Details of the Superfecta Case.

Second, Gerry was forced to discuss, over defense objection, the details of the Superfecta case* - including the names of those involved and the amounts bet (1028-1036, A56-64). The basis for this area of questioning, according to the trial court, was that Gerry had "opened the door" by responding to certain questions put to him by Turcotte's lawyer (1030, A58).

While in an obstruction of justice case, some evidence of a defendant's prior criminal conduct may be introduced to show motive, United States v. Knohl, supra, the questioning here as to names and amounts bet was excessive. It was a clear attempt by the prosecution to "suggest that his entire career has been reprehensible". United States v. Beno, 324 F.2d 582, at 589 (2d Cir. 1963), cert. den. 379 U.S. 880 (1964).

Nor can it be said that limited questioning on cross-examination by counsel for the co-defendant (954-956) "opened the door" since nothing in that testimony could be "deemed adverse to the prosecution". United States v. Provo, supra. Thus, allowing the prosecutor to question Gerry on the details of that Superfecta

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* Gerry had been convicted of Conspiracy and Sports Bribery two weeks prior to this trial. Since the conviction was appealed, the Government was precluded from bringing out the fact of conviction. United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1969).

case was error.

C. Other Appearances by Gerry Before Grand Juries

Third, Gerry was asked on cross-examination, again over objection, whether he had ever appeared before a grand jury other than the one involved in this case. As he stated in the August 30 conversation with Kraft, Gerry admitted appearing before the Grand Jury. He was asked whether he was accused of race-fixing - to which an objection was sustained (988a-991, A52-55).

This question bares the prosecutor's improper motive in this line of questioning. It was clearly another attempt to portray Gerry as a "fundamentally immoral" person. United States v. Beno, supra. The prosecution's claim that it showed "consciousness of guilt" (990, A54) makes no sense. Nor in any way can Gerry's prior appearance before a grand jury be considered a prior similar act.

As this Court said in United States v. Tomaiolo, 249 F.2d 683, at 690 (2d Cir. 1957):

> "In summary, by receiving this mass of inadmissible, irrelevant and highly prejudicial testimony, the District Court permitted the prosecution to paint the defendant Tomaiolo as a bad man, associated with criminal companions, who would do most anything. The accumulation of these errors made it impossible for the jury to limit its consideration to the charges for which Tomaiolo was being tried, and in sum, they constitute reversible error."

POINT IV

INSOFAR AS APPLICABLE TO HIM, DEFENDANT-APPELLANT GERRY ADOPTS THE POINTS ARGUED BY DEFENDANT-APPELLANT TURCOTTE.

CONCLUSION

For all the above reasons, it is respectfully submitted that the conviction of defendant Gerry should be reversed and the indictment dismissed, or, in the alternative, a new trial ordered.

Respectfully submitted,

GOLDMAN & HAFETZ
60 East 42nd Street
New York, N.Y. 10017
(212) 682-8337

Attorneys for Defendant-
Appellant Forrest Gerry, Jr.

January 3, 1975

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

A US COURT OF APPEALS: SECOND CIRCUIT

USA,

Appellee,

- against -

TURCOTTE, et al,

Defendants-Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Karen Giles, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1013 East 180th Street, Bronx, New York

That on the 3rd *day of* January *1975, deponent served the annexed* Brief

upon David Trager *attorney(s) for*

in this action, at 225 Cadman Plaza, Bklyn, New York

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 3rd *day of* January *1975.*

Karen Giles

KAREN GILES

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975